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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. —

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GOLDBLATT BROTHERS, INCORPORATED, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Administrator of the Wage and Hour Division, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered June 25, 1942, reversing in part and affirming in part a decree of the United States District Court for the Northern District of Illinois, Eastern Division, and remanding the case to that court for further proceedings in accordance with the opinion of the Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the District Court (R. 527–535) is reported in 39 F. Supp. 701. The opinion of the

Circuit Court of Appeals (R. 552–559) is reported in 128 F. (2d) 395.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 25, 1942 (R. 560). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Respondent, the operator of ten general department stores in Illinois and Indiana and of three warehouses in Illinois, receives at the warehouses large quantities of merchandise in interstate commerce for the purpose of distributing such merchandise to the ten stores. The flow of goods from the manufacturers and suppliers in other States through the warehouses to the department stores is large, constant, and rapid. Various groups of employees at the warehouses are engaged in checking and counting or performing other clerical work with reference to the extrastate merchandise after it is deposited on the unloading platforms, in moving it into the warehouses to await shipment to the Illinois and Indiana stores, and in distributing it to the Illinois stores. The queston is whether such employees are "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.[1]

[1] In the event that the petition is granted, the Government will also contend that, even if distribution from the ware-

2. At the warehouses respondent also manufactures forms and record books for use in its stores and prepares advertising copy, mats, and the like, for use in both Illinois and Indiana. The question is whether the employees who perform these tasks are engaged in "the production of goods for commerce" within the meaning of Sections 6 and 7 of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix, *infra*, pp. 13–14.

STATEMENT

On April 16, 1940, the Administrator filed a complaint (R. 2–7) against respondent alleging that it employed more than 1,000 employees at its three warehouses in Chicago, Illinois, that these employees were "engaged in commerce" or in "the production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor

houses to the Illinois stores is not within the scope of the Act, many of the employees engaged in such distribution are nevertheless covered because they are also engaged in distribution to the Indiana stores. Similarly, we shall contend that, even if the checking, moving, etc., of goods destined for the Illinois stores after arrival at the unloading platform is not work "in commerce," many of the employees so engaged are covered by virtue of the fact that they also handle goods destined for the Indiana stores. Cf. *Currin* v. *Wallace*, 306 U. S. 1, 11; *Mulford* v. *Smith*, 307 U. S. 38, 47–48; *United States* v. *Darby*, 312 U. S. 100, 118, 121–122; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 616–619.

Standards Act, but that respondent had not paid them the compensation required by those sections and had otherwise violated the Act. An injunction against further violations was sought (R. 6–7). In its amended answer (R. 20–23) respondent challenged the constitutionality of the Act,[2] admitted that some of its employees were not compensated in accordance with Sections 6 and 7, denied the applicability of the Act, and invoked various exemptions.[3]

At the close of plaintiff's affirmative case, the District Court, on its own motion, dismissed the complaint (R. 544–545). The court held that the Administrator had failed to prove that any of the warehouse employees were engaged in commerce or the production of goods for commerce (R. 541–544). The Circuit Court of Appeals affirmed the judgment in part and reversed it in part and remanded the cause for further proceedings (R. 560).

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[2] The constitutional defenses were stricken by the District Court (R. 20).

[3] The principal exemption claimed by respondent was that granted by Section 13 (a) (2) for employees of retail establishments "the greater part of whose selling * * * is in intrastate commerce." The complaint alleged violations only with respect to the warehouse employees; employees at the ten department stores were not involved. In any event, since exemptions are matters of affirmative defense and since the complaint was dismissed at the close of plaintiff's case on motion of the court (R. 545), no question concerning the application of Section 13 (a) (2) was adjudicated by the District Court or the Circuit Court of Ap-

The facts, as shown by plaintiff's evidence, may be summarized as follows: Respondent operates ten department stores, seven of which are in Illinois and three in Indiana, and three warehouses in Illinois from which goods are channelled to the various stores (R. 83–84). The warehouses are located in the central manufacturing district of Chicago (R. 84) and are served by sidings of the Chicago Junction Railroad (R. 102, 103, 112, 113, 497–501). More than 1,000 workers are employed at the warehouses (R. 38–44). A great variety of merchandise, including apparel, hardware, dry goods, toys, foods, household furniture and furnishings, automobile accessories, liquor, jewelry, books, and drugs, is received at the warehouses for distribution to the stores (R. 62–70, 217). The goods arrive by railroad and by truck (R. 59–60, 112–113). A major portion of the goods handled at the warehouses is shipped to respondent from points outside Illinois (R. 31–45). During respondent's fiscal year 1939 merchandise valued in excess of $32,000,000 moved from the warehouses to the stores, of which more than $5,000,000 went to the Indiana stores (Plaintiff's Exhibits 8, 9, 10; see R. 549–550).

This huge quantity of merchandise moves through the warehouses in a constant flow. Large

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peals (see R. 527–528, 542; cf. R. 558). The findings and record do not afford a basis for determining whether the greater part of respondent's retail selling is in intrastate commerce.

receipts and shipments occur daily (R. 120, 122, 135, 157, 203, 244, 251, 271, 284, 287, 386, 389, 404, 410, 413, 416, 420). After the goods have been unloaded and checked, they are either moved immediately to the shipping platform and sent to one of the stores (R. 124, 377, 379) or are taken by one of the unloading employees to an elevator and thence to the department of the warehouse where such goods are needed (R. 114, 115, 219). When an order is received, the goods are taken to the shipping platform, checked, loaded on one of the defendant's trailers, and taken to the store ordering the merchandise (R. 117–119). All employees at the warehouses are necessary to the movement of the goods through them (R. 96–101, 103, 120, 142, 160, 161). Respondent operates a large number of trailers and trucks for the purpose of transporting the goods from the warehouses to the stores (R. 118). Rapidity of movement through the warehouses is emphasized (R. 157, 221). Goods are frequently sent to the stores on the day of their receipt at the warehouses (R. 212, 217, 245, 248, 251, 271, 276, 280, 281, 287, 293, 377, 386, 389, 404, 405, 416, 421, 423, 427, 428, 431, 434). Respondent's merchandise manager testified that the "greatest portion" of the goods received at the warehouses were shipped out the same day (R. 221; see R. 136–138, 148, 356, 386, 392, 410, 416).

Respondent's Merchandising Division aggregates the requirements of all the stores and places orders

with extrastate suppliers to meet the total requirements (R. 39, 218–220). This centralized procurement is carried on in conjunction with a centrally planned selling program which forms the basis of the estimated requirements of each store (R. 231, 263). A six months' operating budget is prepared for each department of each store on the basis of the past sales of that department, with additions for anticipated increases in volume (R. 263). The advertising campaign for the budget period is planned to assure a proper correlation among procurement, sales quotas, and promotional activity (R. 231, 265). Within the framework of the budget, the departmental buyers plan the purchasing for each department on the basis of four-week periods (R. 264). A goal is to have half of the goods delivered to the stores before the start of the period and to have the other half available for delivery during the period (R. 264). Frequent visits to the stores keep the buyers informed concerning the sales volume and goods at hand (R. 234, 267); thus deliveries to the stores are governed not only by the figures in the budget, but also by day-to-day information with respect to current needs.

At one of the warehouses respondent maintains a multilith department in which it manufactures and binds printed forms and tablets for use in the stores (R. 92), and art, advertising, and engraving departments in which it prepares "copy" and illustrations for advertisements and performs print-

ing and engraving operations necessary to make the "mats" from which both circular advertisements and newspaper advertisements are printed (R. 438, 439, 441–446). After circulars are printed by commercial printers they are distributed in Indiana and Illinois (R. 400); respondent spends almost a million dollars a year on its circular advertising alone (*ibid.*). Advertisements prepared in these departments are printed in Chicago newspapers which are distributed outside of Illinois; they also appear in local papers in Indiana (R. 397, 401, 439).

The Circuit Court of Appeals held that the warehouse employees who move the goods into the warehouses from the unloading platforms, those who check and count it or perform other clerical functions with reference to the goods after their deposit on the unloading platforms, and those who distribute the goods to the Illinois stores, are not "engaged in commerce" (R. 559). The court also held that the employees in the multilith, art, advertising, and engraving departments were not engaged in "the production of goods for commerce" (*ibid*).

REASONS FOR GRANTING THE WRIT

1. The principal question involved in the present case is now before the Court in *Higgins* v. *Carr Brothers Co.,* No. 97, certiorari granted June 8, 1942, and is raised by the petition for certiorari in *Walling* v. *Jacksonville Paper Co.,* No. 336. In that petition we have pointed out the reasons why

we deem the question to be one of importance in the administration of the Fair Labor Standards Act.

The present case complements, in a significant respect, the presentation of the question made in the *Higgins* and *Jacksonville* cases. In those cases goods were largely ordered and brought into the State by wholesalers to satisfy the requirements of their customers, as anticipated on the basis of previous business experience. In the present case the goods are ordered and received by respondent not in anticipation of the demands of others, but to meet the budgeted and precalculated requirements of respondent's own department stores. There can be no contention here, as there is in those cases, that the goods are brought to the warehouses, and held there, "in anticipation of local sale."[4] The court below failed to recognize that where wholesale establishment and retail outlet are commonly owned and managed, the case is *a fortiori* in rela-

[4] The only sales made by respondent are sales at retail through its department stores. These sales would be relevant if the Administrator were attempting to apply the Act to employees at a warehouse which functioned as a part of the retail stores, i. e., where goods are stored at the warehouse until sold at the store by floor sample and are then delivered from the warehouse to the retail customer. Such employees would, in any event, be exempt from Sections 6 and 7 by virtue of Section 13 (a) (2) where the greater part of the retail selling is in intrastate commerce. The warehouses here involved are not of that type. When held at respondent's warehouses at all, the goods are held for delivery to the stores, not for "local sale."

tion to the "prior order" situation; indeed, while the court pointed to the latter situation as one in which interstate commerce continues past the warehouses, it relied upon the fact that respondent received no prior orders from its own stores (R. 556). But respondent's stores are in no sense "customers" of a wholesaling establishment; they constitute the retail outlets of a single enterprise which allocates goods among the outlets, purchases the requisite goods, passes them through its warehouses, and distributes them among the stores. There would appear to be no greater force to a contention that the interstate journey is terminated by delivery to the distributing agent of the purchaser than there would be with respect to delivery to such an agent of the seller. Cf. *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 303; *DeLoach* v. *Crowley's, Inc.,* 128 F. (2d) 378, 379 (C. C. A. 5).

The circumstances of the present case further demonstrate the fictitious and arbitrary nature of a line drawn sharply at the warehouses' unloading platform. If the incoming goods are checked while they are still on the trucks the checkers are covered by the Act, but if the identical work is performed after the goods touch the platform the checkers are excluded (R. 555, 559). And since the court thought that the line must be drawn whether or not the goods are to pass again in commerce to the In-

diana stores (R. 559),[5] there are employees who perform "local" tasks between the segment of commerce which ends at the unloading platform and the segment which concededly begins, perhaps immediately thereafter,[6] at the packing table.

2. The Circuit Court of Appeals held, without discussion (see R. 559), that the employees of respondent who are engaged in manufacturing forms and paper tablets for use in the department stores, including those in Indiana, or in the preparation of respondent's advertising copy for Indiana and Illinois newspapers, or in the preparation of circulars for distribution in both States, are not engaged in "the production of goods for commerce" within the meaning of Sections 6 and 7 of the Act. The work of these employees is, rather plainly, necessary to the production of goods which pass in interstate commerce. *Kirschbaum* v. *Walling,* No. 910, last Term, decided June 1, 1942; Section 3 (i). There are thousands of employees engaged in the

[5] As stated, *supra*, p. 5, during respondent's fiscal year 1939, goods valued in excess of $5,000,000 passed through the warehouses to the Indiana stores (Pltfs. Exhs. 8, 9, 10; see R. 549–550).

[6] The rapidity of movement through the warehouses is somewhat greater here than it is in either the *Higgins* or *Jacksonville* cases. A large part of the goods received was shipped out the same day (*supra*, pp. 5–6), a practice made possible by allocation of the goods prior to their arrival. Where the goods are actually *in transitu* from the time they leave the hands of the carrier until they arrive at respondent's stores, the principles laid down by the court below are impossible to apply.

preparation of such articles whose status under the Act is thrown into sharp question by the decision below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

IRVING J. LEVY,
Acting Solicitor, United States Department of Labor.

SEPTEMBER 1942.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*):

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

* * * * *

SEC. 3. (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates— * * *

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce— * * *

* * * * *

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 418

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

GOLDBLATT BROS., INC., a corporation,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

ABRAM N. PRITZKER and
STANFORD CLINTON,
Attorneys for Goldblatt Bros., Inc.,
Respondent.

Rassmann & Miller, 33 N. Market St., Chicago. Franklin 6363

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 418

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW.

The opinion of the District Court (Tr. 527-535) is reported in 39 F. Supp. 701. The opinion of the Circuit Court of Appeals (Tr. 552-559) is reported in 128 F. (2d) 395.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered June 25, 1942 (Tr. 560). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Are any of respondent's employees engaged in commerce or producing goods for commerce within the meaning of Sections 6 and 7 of the Fair Labor Standards Act of 1938?

STATUTE INVOLVED.

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix to the petitioner's brief on Pages 13 and 14, with the exception of Section 13(a)(1) of the Act which is set forth in the Appendix hereto.

STATEMENT.

Petitioner's statement of the case is inadequate. Respondent is engaged in the local sale[1] of goods at retail to ultimate consumers in ten retail department stores all located within the local metropolitan commercial area of Chicago. (Tr. 83-84) Respondent's business originated in a single store. (Tr. 228.) As the business developed, respondent needed extra space and acquired the three warehouses

[1] No contention is made by the petitioner that respondent's employees are within the Act on the ground that they are engaged in the making of interstate sales.

here involved, all of which are located in the City of Chicago, at 3932 South Wolcott Avenue, 1927 West Pershing Road, and 39th and Wentworth Avenues.[2] All of these warehouses are used as necessary incidents of respondent's retail business for the buying, receipt and storage of goods. (Amended Answer to Interrogatory I, Tr. 39-44)

While the merchandise purchased by the respondent is usually delivered to the warehouses, frequent deliveries are made directly to the stores. (Tr. 234) Generally, the soft lines such as clothing are handled at Wolcott; hard goods such as furniture at Wolcott; foods at Pershing. (Tr. 84) The company's executive and administrative personnel are also located at the warehouses. (Tr. 108) Slip covers, draperies and comforters are made from finished yard goods solely for respondent's retail customers. (Tr. 91, 237) Foods for respondent's retail customers are prepared at Wentworth. (Tr. 123-4, 185)

Substantial quantities of merchandise are held in the warehouses for delivery after sale directly to purchasers.[3] Servicemen handling, installing and servicing appliances, gas ranges and refrigerators after sale work out of Wentworth. (Tr. 145)

Practically all of the activities carried on at respondent's warehouses were at one time or another carried

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[2] The warehouses will be here referred to as "Wolcott", "Pershing" and "Wentworth".

[3] This is true of furniture (Tr. 131), draperies (Tr. 130-1), groceries (Tr. 182-3), and bakery and food products (Tr. 183-4). In many instances goods returned by customers are taken to the warehouses (Tr. 133). The statement of petitioner in Footnote 4 on Page 9 of the Petition "When held at respondent's warehouses at all, the goods are held for delivery to the stores and not for 'local sale'" is incorrect.

on or to some extent are still being carried on at respondent's retail stores. (Tr. 170-1, 236-7, 173-4) The activities carried on at the warehouses are commonly carried on by other large retailers either in their warehouses or in their retail stores. (Tr. 171-5, 181)[4]

Respondent's entire business is conducted as a single integrated enterprise. All executive and managerial authority for every phase of the business, both in the selling and non-selling premises, originates from the warehouses. This warehouse supervision of the stores includes such things as kinds and quantities of inventory, selling price, personnel, the physical arrangement of store premises, display of merchandise and deliveries. (Tr. 235, 167-9, 109, 146, 231, 240, 166)

As convenient and efficient operation of the business dictates, and as determined by the central warehouse authority, merchandise is shifted from warehouse to warehouse, warehouse to store, store to warehouse and store to store. (Tr. 132, 184, 237, 147-8) There are similar transfers of employees ranging from individual employees to transfers of entire departments. (Tr. 108, 141, 184, 189, 248)[5] In some instances orders are taken in one store and deliveries made from stock of another. (Tr. 147-148)

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[4] Job Descriptions for the Retail Trade, a 3 volume publication by the United States Employment Service of the United States Department of Labor, published in April of 1938. The publication describes retail processing operations as merchandising servicing. Volume 2, Page 261, et seq. See also Vol. 1, Introduction, Page XXXI.

[5] In the winter of 1940 about two years after the adoption of the Act, a large group of office employees was transferred from the State Street store to Wolcott (Tr. 108, 348).

ARGUMENT.

The request for certiorari is premature. Since the District Court, on its own motion, dismissed the complaint at the conclusion of the petitioner's evidence (Tr. 544-545), respondent has not yet had the opportunity of introducing its evidence. As a result, if the Court grants certiorari at this time, it will be deciding the interstate activities of respondent's employees on an incomplete, and therefore inaccurate, record.

In view of the fact that the judgment of the Circuit Court of Appeals remands the case, requiring the respondent to proceed (Tr. 560), we think the proper course is to withhold the granting of certiorari until respondent's evidence in explanation and in contradiction of the evidence introduced by the petitioner is before the Court. No useful purpose can be served by determining piecemeal whether any of respondent's employees are covered by the Act.[6]

Furthermore, it is respondent's position that the restricted and limited application of the Commerce language in the Act, as applied to employees of retailers, can best be understood in the light of the evidence respondent will offer in support of its contention that its employees are, in any event, exempt under Section 13(a)(1) as being

[6] Respondent, of course, maintains that none of its employees is engaged in commerce or producing goods for commerce within the meaning of the Fair Labor Standards Act of 1938. Hence, if certiorari should be granted, respondent will maintain that the Circuit Court of Appeals erred to the extent that it reversed the judgment of the District Court.

engaged in a local retailing capacity, and under Section 13(a)(2) as being employees of a retail establishment "the greater part of whose selling * * * is in intrastate commerce."

In short, while it may be true that ultimately the significance of the issues involved here requires final adjudication by this Court, such adjudication should be withheld until this Court can intelligently consider the application of the Act to the employees of respondent in the light of a complete record.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

ABRAM N. PRITZKER and
STANFORD CLINTON,
Attorneys for Goldblatt Bros., Inc.,
Respondent.

APPENDIX.

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., Sec. 201 *et seq.*):

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide * * * local retailing capacity * * * (as such terms are defined and delimited by regulations of the Administrator)[7] * * *

[7] The Administrator defines these terms in regulations issued in October, 1940, Title 29, Labor, Chapter 5, Wage and Hour Division, Part 541, Section 541.4, Code of Federal Regulations (published in the Federal Register October 15, 1940) as follows: "The term 'employee employed in a bona fide * * * local retailing capacity' in section 13(a)(1) of the act shall mean any employee

(A) who customarily and regularly is engaged in

(1) making retail sales the greater part of which are in intrastate commerce; or

(2) performing work immediately incidental thereto, such as the wrapping or delivery of packages, and

(B) whose hours of work of the same nature as that performed by non-exempt employees do not exceed 20 per cent of the number of hours worked in the workweek by such non-exempt employees."

(13)

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 418

L. METCALFE WALLING, Administrator of the Wage & Hour Division, United States Department of Labor, *Petitioner*

vs.

V. GOLDBLATT BROTHERS, INCORPORATED, a corporation.

PETITION FOR LEAVE TO FILE MEMORANDUM AND MEMORANDUM, AS AMICUS CURIAE, ON BEHALF OF AMERICAN RETAIL FEDERATION IN CONNECTION WITH A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 418

L. METCALFE WALLING, Administrator of the Wage & Hour Division, United States Department of Labor, *Petitioner*

vs.

V. GOLDBLATT BROTHERS, INCORPORATED, a corporation.

PETITION FOR LEAVE TO FILE MEMORANDUM AS AMICUS CURIAE

The undersigned respectfully petitions this Honorable Court for leave to file a memorandum as amicus curiae in connection with the petition for a writ of certiorari in the above-entitled suit. Counsel for both parties have assented in writing, as indicated by letters filed with the clerk of this court.

This application is made by the undersigned as counsel for American Retail Federation, Washington, D. C., members of which include thirteen national and twenty-eight state retail associations. A list of these members is attached hereto as appendix "A". Issues involved in the present litigation are of direct and vital interest to the federation and its members as well as to many other retailers.

Respectfully submitted,
CHARLES B. RUGG

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October 16, 1942

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 418

L. METCALFE WALLING, Administrator of the Wage & Hour Division, United States Department of Labor, *Petitioner*

vs.

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MEMORANDUM OF AMICUS CURIAE IN CONNECTION WITH A PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the district court (R. 527-535) is reported in 39 F. Supp. 701. The opinion of the Circuit Court of Appeals (R. 552-559) is reported in 128 F. (2nd) 778.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 25, 1942 (R. 560). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED[1]

(1) Whether the individuals employed in three Illinois warehouses owned by the respondent, from which merchandise purchased outside the state is distributed to the respondent's stores and customers, are "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

(2) Whether certain of the individuals employed in the warehouses who prepare record books, memoranda and advertising for use in, and for the benefit of, the respondent's stores, are "engaged in the production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in appendix "B" infra, p. 12.

STATEMENT

Goldblatt Brothers, Incorporated, is a retail business enterprise operating ten fully stocked department stores and three warehouses which serve as necessary adjuncts to the ten stores. With the exception of three department stores in Indiana, the business is located in Chicago, Illinois. Merchandise from other states is received at the three warehouses and distributed from there either to the stores or directly to the purchaser.[2] The work

[1]These questions are present on the record at this stage, but the real question in the case is not yet entirely disclosed on the record. It is whether, under all the circumstances, the Fair Labor Standards Act is to be applied to the individuals employed in the warehouse. Inherent in that question and in addition to the problems of whether the employees are engaged "in commerce" or in "the production of goods for commerce", are the problems of whether the employees are engaged in an exempt capacity or work in an exempt establishment. These problems are integrated. They are all essential parts of the real question in this case. That question should be considered comprehensively.

[2]The statement in the Petition for Certiorari appearing in footnote 4 on page 9 to the effect that all merchandise in the warehouses is held for delivery to the stores appears to be an error. (See: R. 132-133, 392, 413-414, 425-427, 429, 431, 542.)

of most employees in the warehouses is concerned with receipt, storage and distribution of the merchandise although the advertising program for the stores is worked out and executed by employees some of whom work at the warehouses. Paper forms in the nature of order blanks, and warehouse records as well as delivery schedules are made up and printed in one of the warehouses. The entire Goldblatt operation is considered one enterprise (R. 242).

The Administrator of the Wage & Hour Division of the Department of Labor asserts (R. 2-7) that the individuals working in the three warehouses are "engaged in commerce" or "in the production of goods for commerce" and therefore subject to the terms of the Fair Labor Standards Act. At the trial the District Court, on its own motion, dismissed the complaint when the Government rested (R. 544-545). The Circuit Court of Appeals found error in the holding of the District Court that none of the employees could be found to be engaged in commerce or in the production of goods for commerce and, after reversing the judgment in part, remanded the case in order that further evidence could be heard as to the duties of each employee and as to the defenses raised by the respondent.

ARGUMENT

I.

The retail industry in this country is large.[3] It operates in every community. Very frequently warehouses function as an integral part of a retail enterprise. The status under the Fair Labor Standards Act of em-

[3]In 1939 there were 1,770,355 stores and the total number of employees, including active proprietors of unincorporated businesses engaged in retail enterprises, was 6,213,890. (Statistical Abstract of the U. S.—1941. Published in 1942 by U. S. Department of Commerce, Bureau of the Census, Table 910, page 926.) Total retail store sales for the year 1941 were $53,613,000,000. ("Domestic Commerce" issued by U. S. Department of Commerce Vol. 29, No. 7, p. 13.)

ployees working in such a warehouse is an important question and the retail industry is interested in an authoritative determination of it. However, we feel that this case does not now present an adequate record on which to consider that status of such employees, and that the record does not fairly describe a retail enterprise in which a warehouse functions as an integral part.

The ultimate question in this case is whether the respondent is subject to Sections 6 and 7 of the Fair Labor Standards Act in respect of any or all of the employees who are employed at its warehouses. The District Court held that none of the employees were engaged "in commerce" or "in the production of goods for commerce" within the meaning of those sections. The Circuit Court of Appeals was of the opinion that some of the employees were so engaged while others were not. Thus, as the case now stands, it presents only the question whether employees working in various capacities in a warehouse functioning as an integral part of a retail mercantile enterprise are engaged in commerce or in the production of goods for commerce within the meaning of Sections 6 and 7.

But that question is not determinative of the ultimate status of the employees of the respondent under the Act. Section 13(a)(1) and (2) provides that Sections 6 and 7 shall not apply to any employee "employed in a bona fide retailing capacity" or "in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce". The test of coverage under Sections 6 and 7 relates to the nature of the employment of the particular employee. (*Kirschbaum* v. *Walling*, No. 910, last Term, decided June 1, 1942, 62 S. Ct. 1116, 1120.) The application of the exemption under Section 13(a)(2) on the other hand, turns on the nature of the employers business. (Interpretive Bulletin Number 6, Wage and Hour Division, 1942 Wage and Hour Manual, 326.) Nevertheless, where problems of coverage and exemption

exist in a single case, the two can not sensibly be separated.

In addition to denying that its employees are engaged in commerce or in the production of goods for commerce, the respondent has alleged in its pleadings (R. 21-23) that the employees concerned are employed in an exempt local retailing capacity and that the respondent is an exempt retail establishment of which the warehouses are an integral part[4]. On neither of these issues has the respondent yet offered its evidence. The question of the application of the statutory exemptions has not been considered[5]. Therefore, the decision of the court below is not, and a decision by this Court cannot be, dispositive of this case. By the same token, a decision by this Court on the present record would not settle the ultimate question, of general application and importance, as to the status under the Fair Labor Standards Act of an employee employed in a warehouse that functions as an integral part of a retail enterprise.

Moreover, we submit that the present record does not furnish an adequate basis for an authoritative determination of the questions presented. While the respondent operates a retail enterprise in which warehouses function as an integral part, this record does not fairly describe such an enterprise. Consisting solely of evidence offered by the petitioner, it necessarily fails to disclose all the facts which may be relevant or to supply the perspective which might be expected to result from evidence offered by the respondent to sustain its affirmative defense and to rebut, control and amplify the evidence offered by the petitioner. Thus, it does not

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[4]The District Court specifically found (R. 541) that the warehouses were "necessary adjuncts" of the respondent's business.

[5]In remanding the case to the District Court the Circuit Court of Appeals said: (R. 559; 128 F. 2nd, 778, at 784) "We do not attempt to frame a final judgment, inasmuch as the order appealed from was entered without complete hearing. Furthermore, as only the Administrator's evidence was heard, what we have said shall not prejudice in any manner the defendant's right to prove any of the statutory exemptions."

give the Court the benefit of fully developed facts upon which to base a decision. On the contrary, it fails to describe adequately either the work of the respondent's employees or the nature of the respondent's business.

This is particularly true with respect to the second of the two questions raised by the petition, namely, whether certain employees in one of the respondent's warehouses who prepare record books, forms and advertising for use in or for the benefit of the retail stores are engaged "in the production of goods for commerce". That was clearly treated as a secondary issue and the facts concerning it were only incidentally developed by the petitioner's evidence (See: R. 42, 91-93, 98, 104-105, 395-403, 437-447, 487-493). Nearly all retail enterprises employ individuals to do work of this general nature although the work may not be done in warehouses. Consequently, this question is also of importance to the retail industry. We feel that it would be unfortunate to have it considered on the basis of an inadequate record consisting only of the evidence offered by the petitioner which does not fully describe the work done by the employees concerned or the relation of that work to the respondent's entire organization.

We submit that the state of the record is such that a writ of certiorari should not now be granted. This is a proceeding where facts determine the applicability of the statute and the applicability of the statute is challenged. The "salutary principle that the essential facts should be determined before passing upon grave constitutional questions . . . ." is analagous and pertinent. See *Polk Co.* v. *Glover,* 305 U. S. 5, 10; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 211-213.

II.

Although the use of warehouses is common to both, the type of retail enterprise of which the one operated by Goldblatt Brothers, Incorporated is an example, differs substantially from the type of wholesale enterprise of which the ones operated by Carr Bros. Company[6], and Jacksonville Paper Company are typical[7]. In the latter type of enterprise, merchandise from out of the state reaches the warehouse and is then sold at wholesale for subsequent resale or for industrial consumption. In the former, when the merchandise arrives at the warehouse, it is already in the hands of the ultimate retailer. In the Higgins and in the Jacksonville Paper Company cases the respondents do not own the outlets to which the merchandise is distributed from the warehouse[8]. The contrary is true in the present case. In neither of those cases is there any question of statutory exemption. In the instant case there is. The Administrator of the Wage and Hour Division, nevertheless, seeks to apply his view[9] indiscriminately to both types of enterprise and suggests[10] that the present case will complement the presentation of the principal question in the Higgins and Jacksonville Paper Company cases.

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[6]*Higgins* v. *Carr Brothers Company*, No. 97, pending before this Court, certiorari granted June 9, 1942.

[7]*Walling* v. *Jacksonville Paper Co.*, No. 336, petition for certiorari now pending.

[8]The matter of identity of ownership between the warehouse and all the outlets may be important on the issue of whether the employees working in the warehouse are engaged "in commerce." (See: *Fleming* v. *American Stores Co.*, U.S. D.C., E.D., Pa., 42 F. Supp. 511, 524) and it may be determinative of whether the enterprise is exempt. *White* v. *Jacobs Pharmacy Co. Inc.*, decided September 28, 1942. U.S. D.C., N.D. Ga., 5 W. and H. Rep. 793.

[9]The Administrator's view is that all employees in a warehouse occupy an intermediate, not terminal, position in interstate commerce. See petition for certiorari in *Walling* v. *Jacksonville Paper Co.*, pp. 9-11.

[10]Petition for certiorari, pp. 9-11. See also: petition for certiorari in *Walling* v. *Jacksonville Paper Company*, p. 9.

We feel that the two types of enterprise are essentially different and that such similarities as exist between them militate against rather than support the petitioner's application for certiorari at this time. While a ruling in the Higgins case against the Administrator's view would prevent the subsequent application of it to a retail enterprise such as Goldblatt Brothers, a ruling in favor of the Administrator's view would not determine its application to employees working in a warehouse that functions as an integral part of a retail enterprise. This we believe to be true not only because of the specific exemptions contained in Sections 13(a)(1) and (2), but also by reason of the important differences between wholesale and retail warehouses in relation to the application of Sections 6 and 7 of the Act.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted
CHARLES B. RUGG
Amicus Curiae

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October 16, 1942.

APPENDIX A

American Retail Federation

MEMBER ASSOCIATIONS

THIRTEEN NATIONAL ASSOCIATIONS

American National Retail *Jewelers* Association
Cooperative *Food* Distributors of America
Mail Order Association of America
National Association of Chain *Drug* Stores
National Association of *Food* Chains
National Association of Retail *Grocers*
National *Automobile* Dealers Association
National Retail *Dry Goods* Association
National Retail *Farm Equipment* Association
National Retail *Furniture* Association
National Retail *Hardware* Association
National *Shoe* Retailers Association
National *Voluntary Groups* Institute

TWENTY-EIGHT STATE ASSOCIATIONS

California Retailers Association
Colorado Retailers Association
Delaware Retailers' Council
Florida Merchants Association, Inc.
Georgia Mercantile Association
Illinois Federation of Retail Associations
Associated Retailers of *Indiana*
Associated Retailers of *Iowa,* Inc.
Kentucky Merchants Association
State Merchants Association, Inc. (*Maine*)

Maryland Council of Retail Merchants
Massachusetts Council of Retail Merchants
Michigan Retail Institute
Missouri Retailers Association
Nevada Retail Merchants Association
New Hampshire Council of Retail Merchants
Retail Merchants Association of *New Jersey*
New York State Council of Retail Merchants
North Carolina Merchants Association
Ohio State Council of Retail Merchants
Oklahoma Retail Merchants Association
Pennsylvania Retailers' Association
Rhode Island Retail Association
Retail Merchants Association of *Tennessee*
Retail Merchants Association of *Texas*
Utah State Retailers' Association
Vermont Council of Retail Merchants
Retail Merchants Association of *Virginia*

APPENDIX B

Fair Labor Standards Act. c. 676, 52 Stat. 1060 (29 U.S.C., Sec. 201, et seq.).

Section 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates . . .

Section 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . .

Section 13 (a). The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; . . .